Supreme Court, U.S.
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92-605

No. _____

In The

Supreme Court of the United States

October Term, 1992

GERALD AMIRAULT,

Petitioner,

v.

MICHAEL FAIR,
COMMISSIONER OF DEPARTMENT
OF CORRECTIONS,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a juror's failure to disclose on voir dire examination that she had been a victim of a crime similar to the crime with which petitioner was charged presented an extreme circumstance warranting a finding of implied bias and operated to deprive petitioner of his Sixth Amendment right to an impartial jury.

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OPINIONS BELOW

The July 8, 1992 opinion of the United States Court of Appeals for the First Circuit which is herein sought to be reviewed is reported in 968 F.2d 1404 (1st Cir. 1992) and is printed in the appendix of this Petition on page 1. The opinion of the United States District Court for the District of Massachusetts is also printed in the Appendix on page 8. The Trial Court's Memorandum of Decision on Defendant's Motion for New Trial is unreported and printed in the Appendix on page 30.

The opinions of the Massachusetts Supreme Judicial Court are reported in 399 Mass. 617, 506 N.E.2d 129 (1987) and 404 Mass. 1004, 535 N.E.2d 193 (1989) (*Commonwealth v. Amirault*).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit (App.1)* was entered on July 8, 1992. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States which provides as follows:

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* (App. refers to the Appendix attached to the Petition for Writ of Certiorari).

Amendment VI – JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The Petitioner, Gerald Amirault, was convicted on July 19, 1986 by a Massachusetts state court jury on multiple indictments charging him with rape and abuse of a child and indecent assault and battery. Following the verdict, defense counsel received a telephone call from an individual who revealed that one of the deliberating jurors had been raped as a young teenager. The caller stated that he believed the juror to be the same woman who accused his cousin of raping her when she was young. He further indicated that the case had gone to court and that his cousin had served a lengthy term of imprisonment.

Defense counsel immediately brought this matter to the attention of the trial court and the court allowed counsel to examine the juror's voir dire responses as well as conduct an investigation into the rape allegations. A private investigator spoke with various family members

of the juror who confirmed that she had indeed been raped and that the offender had been imprisoned as a result. It became evident that when this particular juror was asked on voir dire if she or a member of her family had ever been involved in a civil or criminal case, she failed to inform the court of her own experience as a sexual assault victim. (App. 31-32).

On behalf of the petitioner, defense counsel filed a Motion for New Trial and for Post Verdict Investigation and Inquiry of a Juror with supporting preliminary memorandum and affidavits. On August 19, 1986, the trial judge conducted an *in camera* inquiry of the juror. At this hearing, initial questioning was done by the court and then defense counsel was provided with the opportunity to examine the juror.

The juror testified, in pertinent part, that to her knowledge she could not remember being the victim of a crime. But, if something did happen, it had to be over forty years ago and she must have blocked it from her mind. Upon further probing she did admit that something did happen in her life, but she could not recall any details about it whatsoever. She denied any knowledge of the nature of the incident or of her age at the time it occurred. She further denied ever having told anyone about the incident and claimed that it did not come to her mind during petitioner's trial.

At the conclusion of the hearing, a clerk of the trial court revealed to defense counsel that the juror's testimony did not comport with information he had received from her attorney. The clerk had spoken with the attorney in connection with the post verdict hearing and was

informed that the juror had been the victim of a sexual assault. The incident was revealed by the juror to her attorney and then relayed to the clerk less than one week prior to the hearing where, under oath, the juror claimed to have no recollection of the event whatsoever.

As a result of this, defense counsel requested leave to file an affidavit by the clerk and the opportunity to present additional witnesses in support of their Motion for New Trial. Counsel specifically requested permission to offer the testimony of the clerk, who was present in chambers, as evidence that the juror was not truthful in her responses at the post verdict inquiry. This request was denied and on the following day, the court also denied petitioner's Motion for New Trial. (App. 30). The petitioner appealed this decision.

A renewed investigation was permitted by the court which subsequently confirmed that the juror was indeed raped on June 29, 1946 by a neighbor whose son she was babysitting. At the time of petitioner's trial, the juror resided within walking distance of her assailant's home. She reported the rape to her caretaker and six days later swore out a criminal complaint in a Massachusetts court charging the assailant with an offense under Massachusetts General Laws, Chapter 265, Section 23, the very same offense for which this petitioner was convicted. Two weeks following the rape, she testified at a probable cause hearing. After trial, the assailant was convicted and sentenced to a term of 4 to 6 years in the state prison.

A Renewed Motion For New Trial was subsequently filed and thereafter denied. On August 19, 1988, the Massachusetts Supreme Judicial Court took jurisdiction

of the case on its own motion. The Court reaffirmed the trial judge's order as well as the convictions on March 6, 1989.

On May 4, 1989, having exhausted all state remedies, the petitioner filed a Writ of Habeas Corpus in the United States District Court for the District of Massachusetts pursuant to 28 U.S.C., Section 2254. The District Court denied petitioner's Writ of Habeas Corpus on October 7, 1991. (App. 8). The United States Court of Appeals for the First Circuit affirmed the district court decision. (App. 2).

REASONS FOR GRANTING THE WRIT

In petitioner's case, the First Circuit found that a juror who failed to disclose on voir dire examination the fact that she was the victim of a similar crime was not impartial. In applying the standard established in *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548 (1984), the First Circuit accepted the trial court's determination that the juror had "genuinely blocked from her conscious mind the memory of the event and that she therefore answered the voir dire questions honestly." (App. 3).

The trial court's determination was based on the testimony of the juror and her assertion that something did happen to her but that she blocked it from her memory. The trial court considered her demeanor, yet did not examine the blatant inconsistencies and contradictions that were evident in her testimony at the post trial

hearing. The petitioner's request to present additional witnesses was declined. The petitioner was denied the chance to prove actual bias as required by *McDonough*. In effect, the petitioner was precluded from introducing evidence that the juror failed to answer honestly the questions posed on voir dire examination. This presents an important reason for granting the instant petition.

Additionally, the First Circuit Court concluded that bias should not be implied in petitioner's case since the situation did not rise to the level of "exceptional" or "extreme" circumstances. However, the factors necessary to constitute such circumstances are not well settled nor clearly defined. Moreover, the court's refusal to infer bias in petitioner's case runs counter to decisions of the courts of appeal for other circuits. These reasons and the importance of the Sixth Amendment right to an impartial jury compels the granting of the instant writ of certiorari.

I.

THE FIRST CIRCUIT COURT OF APPEALS FAILED TO APPLY THE PRECEDENT OF THIS COURT ON THE QUESTION OF JUROR BIAS

This court has determined that the remedy for allegations of juror partiality is a post-trial hearing in which the defendant has the opportunity to prove actual bias. *Smith v. Phillips*, 455 U.S. 209 (1982). A party must first demonstrate that the juror did not answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a

challenge for cause. *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548 (1984).

After the trial court's colloquy with the juror, the court concluded that the juror "blocked" from her mind the sexual assault and therefore, her responses on voir dire were honest. Despite the fact that the juror's testimony was replete with inconsistencies and contradictions, the trial court concluded that the juror's nondisclosure was not intentional. (App. 36). The trial court stated, "based upon the evidence produced and reviewed, it was and is clear and settled in the mind of the court that [the juror] harbored no bias or prejudice against the defendant." (App. 38).

The First Circuit Court of Appeals agreed with this determination, but failed to note that the trial court's conclusion was based on evidence limited solely to the testimony of the juror. The trial court declined to allow the petitioner the opportunity to present additional witnesses and evidence of actual bias as suggested by the standard set out in *McDonough.*

The petitioner recognizes that a trial court's determination is entitled to deference in a habeas corpus proceeding. *Patton v. Yount,* 467 U.S. 1025, 1038, 104 S.Ct. 2885 (1984). However, in petitioner's case, he was entirely precluded from demonstrating that the juror was untruthful, intentionally dishonest as well as bias.

The petitioner attempted to offer the clerk's testimony as evidence of the juror's untruthful answers and this request was denied by the court. (App. 4). The conversation that transpired between the juror's attorney and the clerk would have directly conflicted with her claim that she could not

remember the incident at issue. If she "blocked it" from her mind then she did so immediately after it happened, remembered it again some years later, failed to recall the incident at the time of the voir dire examination, retrieved it from her memory in discussion with her attorney, and then failed to recall it again less than a week later – just in time for the post-trial hearing.

After demonstrating that a juror did not answer honestly questions on voir dire, a party must demonstrate that a correct response would have provided a valid basis for a challenge for cause. There is no question that this juror would have been excused from the jury panel had she disclosed the sexual assault prior to the empanelment of the jury. The difficulties inherent in safeguarding a defendant's right to be tried before an impartial jury are compounded when the case involves issues of child sexual abuse. Not only would the juror's prior involvement as a victim of a crime identical to that on trial have provided a valid basis for a challenge for cause, but it would have inevitably led to her dismissal for cause in this case. (App. 36-37).

II.

THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO DEFINE THE EXTREME CIRCUMSTANCES WARRANTING A FINDING OF IMPLIED BIAS

The First Circuit Court of Appeals read the majority opinion in *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548 (1984) to require a further determination on the question of juror bias even where a juror is found to have been honest. However, the court went on to

conclude that bias should not be implied here because the petitioner's situation did not rise to the level of "exceptional" or "extreme" as referenced in the concurring opinion of *Smith v. Phillips*, 455 U.S. 209 (1982) (O'Connor, J., concurring). (App. 5).

This Court has not explicitly adopted or rejected the doctrine of implied bias. The doctrine is recognized in certain situations where a post verdict hearing will not be an adequate remedy to uncover the bias of a suspect juror. While each case must turn on its own facts, there are extreme situations that justify a finding of presumed bias. However, those circumstances warranting such a finding have not been clearly defined.

The Massachusetts Supreme Judicial Court, in applying the standards set forth in *Smith*, 455 U.S. at 221 and *McDonough*, 464 U.S. at 556-57, acknowledged that in certain situations implied bias may be applicable. *Commonwealth v. Amirault*, 399 Mass. 617, 628, 506 N.E.2d 129, 221 (1987). Similarly, federal courts have recognized the doctrine as well. Although courts agree that implied bias is a viable doctrine, the courts have not clearly identified the situations warranting its application.

In dicta, some guidance appears in *United States v. Ferri*, 778 F.2d 985 (3d Cir. 1985), where there were allegations that a juror may have known a collateral witness in an arson case. The Third Circuit, in referring to Justice O'Connor's concurring opinion in *Smith, supra*, noted that the case was not one of those "extreme situations" such as a juror being "the victim of the same type of crime being tried," as in *United States ex rel. DeVita v. McCorkle*, 248 F.2d 1 (3rd Cir.), *cert. denied* 355 U.S. 873, 78 S.Ct. 121

(1957) (juror who had been the victim of a robbery sat on a robbery/murder trial).

The Court of Appeals for the Ninth Circuit has found that the relevant inquiry in determining implied bias is whether the circumstances at hand present "a relationship in which the 'potential for substantial emotional involvement, adversely affecting impartiality,' is inherent[?]" *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990), *cert. denied* 111 S.Ct. 974 (1991) (citing *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979); *United States v. Allsup*, 566 F.2d 68, 71-72 (9th Cir. 1977)). The Fourth Circuit has explained that the question is whether the situation is one in which " 'the relationship between a juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances[?]' " *Tinsley*, 895 F.2d at 527 (quoting *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988)).

The juror in petitioner's case, has endured an experience extremely similar to that of the alleged victims. It is highly unlikely that such an emotional and traumatic personal experience would not interfere with her ability to evaluate evidence fairly and objectively. The Fifth Circuit has acknowledged that " 'when possible non-objectivity is secreted and compounded by the untruthfulness of a potential juror's answer on voir dire the result is a deprivation of defendant's right to a fair trial.' " *United States v. Scott*, 854 F.2d 697, 699-700 (5th Cir. 1988) (citations omitted).

A juror's protests of impartiality are not controlling since the juror may have an interest in concealing a bias or may be unaware of the existence of a bias. Upon

inquiry, "a juror is unlikely to admit that he had been unable to weigh the evidence fairly. If he honestly believes that he remained impartial throughout the trial, no amount of questioning will lead to an admission. Rather, the juror will vehemently deny any accusations of bias." *Smith*, 455 U.S. at 229-230, 102 S.Ct. 948 (Marshall, J., Brennan, J., and Stevens, J., dissenting).

An individual's right to an impartial jury cannot be left to speculation. The parameters of those circumstances requiring the application of presumed bias must be clearly delineated in order to protect an individual's Sixth Amendment guarantee to an impartial jury.

III.

THE COURT OF APPEALS DECISION DOES NOT COMPORT WITH THE PRECEDENT OF OTHER COURTS ON THE ISSUE OF IMPLIED BIAS

The First Circuit Court of Appeals declined to find bias in the petitioner's case. In contrast, other federal courts have been willing to presume bias where a juror or close family member has been involved in a situation with a similar fact pattern. *United States v. Eubanks*, 591 F.2d 513 (9th Cir. 1979). *Accord, United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984) (juror did not truthfully respond when questioned about involvement in prior litigation); *United States v. Bynum*, 634 F.2d 768 (4th Cir. 1980) (juror failed to disclose that a relative was convicted of a crime); *United States v. Allsup*, 566 F.2d 68 (9th Cir. 1977) (the jurors in question worked for the very bank that had been robbed. Despite their protestations of impartiality and the district court's findings of such, the

court found that the employees should have been presumed bias and excused for cause); *Jackson v. United States*, 395 F.2d 615 (D.C. Cir. 1968) (juror was previously involved in a "love triangle" similar to the one at trial); *United States ex rel. DeVita v. McCorkle*, 248 F.2d 1 (3rd Cir. 1957) (in a robbery trial, juror was the victim of a robbery) and *Government of the Virgin Islands v. Bodle*, 427 F.2d 532 (3rd Cir. 1970) (court granted a new trial for rape where it was learned that a juror had a sister who had been the victim of a rape and murder some years previously).

The petitioner's case presents an analogous situation to those cited. The district court points to *Tinsley v. Borg*, 895 F.2d 520 (9th Cir. 1990), *cert. denied* 111 S.Ct. 974 (1991), wherein the Ninth Circuit declined to find implied bias. (App. 20-21). However, that case is clearly distinguishable from petitioner's case in that the juror was not herself the victim of a crime.

In *Tinsley*, the petitioner had been convicted of a rape charge. A member of his jury, a psychiatric social worker, stated on voir dire, that her training involved counseling rape victims, but that she could remain impartial. She neglected to mention, however, that she had counseled a victim of rape and the she testified on the victim's behalf at trial. Although she herself had not been sexually assaulted, Borg's trial triggered her memory and she recalled her past experience.

The Ninth Circuit held that these particular circumstances did not warrant a presumption of bias since "neither the juror . . . herself nor a close relative had been a rape victim or rapist. There was no personal connection

between [her] and the defendant, the victim, or any other witness." *Tinsley*, 895 F.2d at 529.

As demonstrated above, the First Circuit Court of Appeal's determination not to infer bias in petitioner's case, contradicts the decisions of other federal courts cited above where a similar situation was considered.

CONCLUSION

For the reasons stated above, the Petitioner, Gerald Amirault, respectfully requests that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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No.

In The

Supreme Court of the United States

October Term, 1992

GERALD AMIRAULT,

Petitioner,

v.

MICHAEL FAIR,
Commissioner of the Department of Corrections,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

APPENDIX

United States Court of Appeals
For the First Circuit

No. 91-2308

GERALD A. AMIRAULT,

Petitioner, Appellant,

v.

MICHAEL V. FAIR,

Respondent, Appellee.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. A. David Mazzone, U.S. District Judge]

Before

Selya, Circuit Judge,
Lay, *Senior Circuit Judge,
and O'Scannlain, **Circuit Judge.

Frank Mondano with whom *Juliane Balliro* and *Balliro, Mondano, & Balliro, P.C.* were on brief for petitioner.

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*Of the Eighth Circuit, sitting by designation.

**Of the Ninth Circuit, sitting designation.

Pamela L. Hunt, Assistant Attorney General, with whom *Scott Harshbarger*, Attorney General, was on brief for respondent.

July 8, 1992

Per Curiam. Gerald Amirault brings this habeas petition challenging his state court conviction on seven counts of indecent assault and battery of a child, and on eight counts of rape of a child. Amirault claims that a juror's failure to disclose a material fact during voir dire questioning violated his Sixth Amendment right to an impartial jury and that improper remarks made by the prosecutor denied his right to a fair trial. The federal district court denied Amirault's petition for a writ of habeas corpus. We affirm.

Juror Misconduct

Two days after the jury reached its verdict, defense counsel received information that one of the jurors had been a rape victim forty years earlier. Although the jurors were asked on voir dire if they or any of their family members had ever been involved in a civil or criminal case, the juror failed to inform the court that when she was fourteen years old she was raped by a neighbor, brought charges against him, and testified at his trial. The man she accused of raping her was convicted and served a term of imprisonment for the crime.

When defense counsel brought this matter to the attention of the trial court, the court granted counsel permission to examine the juror's voir dire responses, conduct a private investigation into the allegations, and examine state criminal records pertaining to the 1946 rape. The court ultimately conducted an evidentiary hearing to examine the juror. While the court conducted its own inquiry of the juror, it also provided both parties the opportunity to question her. The juror testified that she had no memory of the rape, but suggested that if it had happened it must have been "over forty years ago." She later admitted that something had happened to her as a child but claimed to have no memory of it.

After its examination of the juror, the state trial court concluded that the juror had genuinely "blocked" from her conscious mind the memory of the event and that she therefore answered the voir dire questions honestly. The court further concluded that "[b]ased upon the evidence produced and reviewed, it was and is clear and settled in the mind of the court that [the juror] harbored no bias or prejudice against the defendant. . . . " *Commonwealth v. Amirault*, Nos. 85-70 to 80, 85-2653 to 2666, slip op. at 6 (Mass. Super. Ct. Aug. 20, 1986) (memorandum of decision on defendant's motion for new trial). This conclusion was based in part on the court's assessment of the juror's honesty, sincerity and apparent respect for the integrity of the criminal justice system. Upon determining that the juror neither intentionally deceived the court nor harbored any bias against the defendant, the court declined

to permit the defense to extend the hearing to include other witnesses.[1]

Amirault concedes that the trial court acted properly in conducting a post-conviction hearing to examine the juror and that trial court findings on questions of juror partiality are presumed correct under 28 U.S.C. § 2254(d) (1988). He claims, however, that the trial court's findings of impartiality are not fairly supported by the record. We disagree.

A trial court's findings on issues of juror credibility and honesty are determinations "peculiarly within a trial judge's province" and are accorded great deference. *Wainwright v. Witt*, 469 U.S. 412, 428 (1985); *see also Patton v. Yount*, 467 U.S. 1025, 1038 (1984). As the district court found, the petitioner has failed to produce convincing evidence that the trial court's finding that the juror answered honestly the questions on voir dire was erroneous.

Although we read the majority vote in *McDonough Power Equipment v. Greenwood*, 464 U.S. 548 (1984), to require a further determination on the question of juror

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[1] During a break in the hearing, a court clerk reported to defense counsel a conversation he had had with the juror's counsel. According to the clerk, the juror's attorney told him prior to the hearing that the juror had been the victim of a sexual assault but that she could remember no details. Amirault challenges the court's denial of his request that the clerk be permitted to testify at the hearing because he believes such testimony would have served to impeach the juror. We agree with the district court that such testimony would have had little value to the proceeding.

bias even where a juror is found to have been honest,[2] we find that bias should not be implied here. As the federal district court observed, the situation presented here of a juror found to have blocked the memory of an unrelated forty-year-old rape does not rise to the level of "exceptional" or "extreme" circumstances which may permit a finding of implied bias. *See Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring).

Prosecutorial Misconduct

Amirault claims that certain remarks made by the prosecutor violated his right to a fair trial. Amirault first challenges a reference by the prosecutor to his post-arrest silence as a violation of his Fifth Amendment rights. *See Doyle v. Ohio*, 426 U.S. 610 (1976) (exercise of right to remain silent may not be used against defendant at trial). In her closing remarks, the prosecutor told the jury that while the law forbids the state from approaching the defendant after his arrest, the law does not prevent defendants from affirmatively telling his side of the case. We agree with the district court that the "fair response" exception to the rule applies here. *See United States v.*

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[2] *See McDonough*, 464 U.S. at 556-57 (Blackmun, J., concurring) ("[R]egardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred."); *id.* at 558 (Brennan, J., concurring) ("I therefore cannot agree with the Court when it asserts that a new trial is not warranted whenever a prospective juror provides an honest answer to the question posed.").

Robinson, 485 U.S. 25 (1988). The prosecutor made mention of Amirault's silence because defense counsel had just suggested to the jury that the prosecution was biased against Amirault because no one ever asked him his side of the story. We also find the curative instructions issued by the court sufficient.

Amirault also challenges the prosecutor's reference to facts not in evidence, her expression of personal opinion with respect to a theory advanced by one of Amirault's expert witnesses, her alleged suggestion that the defendant had the burden of disproving the allegations, her mischaracterization of the defense theory, and her suggestion that incriminating evidence had been removed from the defendant's home prior to the jury's visit there. To prevail on these claims, Amirault must show that the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (level of review for cases which do not involve prosecutorial remarks which "so prejudice[] a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right."); *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged proscutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."). We find that petitioner has failed to make this showing. We agree with the district court's finding that these comments did not rise to the level of constitutional error and that the curative instructions were sufficient.

We thus find no constitutional error and affirm the district court's order denying the petition for a writ of habeas corpus.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GERALD A. AMIRAULT,
Petitioner

Vs.

CIVIL ACTION
No. 89-1121-MA

MICHAEL V. FAIR,
Respondent

MEMORANDUM AND ORDER

Mazzone, D.J. October 7, 1991

Petitioner Gerald Amirault has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking release from state custody. Petitioner is a prison inmate at the Massachusetts Correctional Institute ("MCI"), Cedar Junction. Respondent Michael Fair is the Commissioner of the Department of Corrections. Petitioner Amirault presents two constitutional challenges to his state court conviction. He charges: 1) that a juror's failure to disclose a material fact during jury selection violated the petitioner's Sixth Amendment right to an impartial jury; and 2) that the improper remarks made by the prosecution during her closing argument prejudiced the jury and denied the petitioner a fair trial. For the reasons outlined below, the petition for a writ of habeas corpus is denied.

I. PROCEDURAL HISTORY

Petitioner Gerald "Tooky" Amirault was indicted on seven counts of indecent assault and battery of a child under the age of fourteen, and eight counts of rape of a

child under the age of sixteen. The fifteen count indictment involved nine children, both male and female, who attended the Fells Acres Day School in Malden, Massachusetts, the petitioner's place of employment. After a twelve week trial, on July 19, 1986, a Middlesex County jury convicted the petitioner on all fifteen counts. He was sentenced to serve concurrent terms of thirty to forty years on the rape charges, and concurrent terms of eight to ten years on the indecent assault and battery charges.

Petitioner filed a motion for a new trial and for a post verdict investigation and inquiry of a juror on August 1, 1986. The trial judge conducted an *in camera* hearing on August 19, 1986 at which the juror testified. Petitioner was present at this hearing and both defense counsel and the Commonwealth had the opportunity to examine the juror. The trial judge denied the motion for a new trial, which petitioner then appealed. A single justice of the Massachusetts Appeals Court ordered an expedited appeal. On April 13, 1987, the Supreme Judicial Court affirmed the trial judge's decision in *Commonwealth v. Amirault*, 399 Mass. 617 (1987) ("Amirault I"). Petitioner also appealed his convictions, which were not expedited.

Petitioner then renewed his motion for a new trial based on additional information regarding the juror's conduct, which the trial judge denied on February 2, 1988. Petitioner then appealed the denial of his renewed motion for a new trial and his convictions,which were consolidated then transferred to the Supreme Judicial Court by its own motion. On March 6, 1989, the Supreme Judicial Court affirmed the trial judge's order and the convictions in *Commonwealth v. Amirault*, 404 Mass. 221 (1989) (*"Amirault II"*).

Having exhausted his state remedies, petitioner filed this petition for writ of habeas corpus on May 4, 1989. Respondent filed a motion to dismiss arguing: 1) Local Rule 41.1 (A)(1) and (c) require dismissal for want of prosecution, and 2) 28 U.S.C. §2254(b) contains a presumption of finality regarding facts found by the state court, thereby compelling dismissal. On March 21, 1991, I treated the motion as a motion to dismiss on the merits and directed counsel to file appropriate memoranda. Not having received such memoranda and seeking to avoid any misunderstanding by petitioner's counsel, on July 1, 1991, I reiterated my order of March 21. Petitioner filed his memorandum on July 22, 1991 and respondent filed on July 29, 1991. This petition is now before the Court.

II. FACTUAL BACKGROUND

The facts are more fully set forth in the Massachusetts Supreme Judicial Court's opinions in ("Amirault I") and ("Amirault II"). Only those facts relevant to this petition are recounted below.

Impanelment of the jury took place over a period of eight days, involving both written and oral examination of each juror. Each seated juror completed three written questionnaires [sic]: a standard form document, which was completed by all persons summoned to jury duty; and two others which were specifically drafted for this case. In addition, each juror orally answered questions on voir dire.

The juror in question completed the aforementioned process and was seated. In response to the question on the standard form asking the jurors whether they or any

family member had any past or present involvement as a party or victim in a civil or criminal case, the juror responded negatively. On the specially designed form, the jurors were asked if they or any member of their immediate family or any of their close friends had ever been a victim, witness or defendant in a criminal case. The juror responded affirmatively but added that the matter had never gone to trial. Under individual questioning, the juror revealed that a member of the juror's immediate family had been charged with driving under the influence of alcohol. The juror also indicated an ability to be fair and impartial in a case involving child sexual abuse. The juror was found indifferent and there were no objections.

Two days after the verdicts were returned, defense counsel received a call from a person identifying himself as Mr. Galligan who wanted to speak to an attorney involved in the Fells Acres case. Galligan stated he had seen a photograph of the jurors who sat on the case and believed he recognized the juror in question as one who, while a teenager, had accused his cousin of rape. He stated that the case had gone to court and his cousin had been sentenced to a prison term. The attorney asked for additional details, but Galligan would not say anything more. Galligan offered no additional information about himself. He indicated he might call back, but there is no evidence he did.

In order to verify Galligan's story, petitioner's counsel requested the trial judge direct the Commonwealth to provide them access to criminal records. On August, 1, 1986, the trial judge entered an order providing the defendant with the requested access. The defendant

found that Galligan had correctly provided the juror's maiden name as well as other personal information. Having corroborated the information from Galligan, defense counsel extended the scope of the investigation and a private investigator was retained. The investigator interviewed two persons somewhat familiar with the juror's past. One of the individuals stated the juror had been raped and a man had gone to prison for an extended period of time but did not remember the year of the assault or the name of the rapist. The other individual had been told the juror was raped and that a man had been imprisoned for that crime.

The juror in question was ordered to appear for an *in camera* hearing on August 12, 1986. The order stated that the juror was entitled to have counsel present and juror's counsel could view the documents relating to the defendant's motion for a new trial before the hearing date. On August 19, 1986, the juror appeared at the hearing with counsel. Also present were the petitioner, petitioner's counsel and counsel for the Commonwealth.

The hearing was conducted in the trial judge's chambers, in the presence of the petitioner. The judge began the initial questioning, then gave the parties the opportunity to examine the juror. In response to the judge's questions, the juror could not remember being a victim of a crime. The juror, who was 54 years old, continued that if something did happen, "it had to be over 40 years ago" and had been "completely blocked from my mind." The juror knew no details of any crime and could not recall anything about a crime. The trial judge asked the juror about the negative answer given to the Court in response to the question asking about present or past involvement

as a party or a victim. The juror indicated no memory of any such involvement. There is no evidence that anything along those lines came into the juror's mind during the trial, or at any other time. The juror was ready to follow the instructions of the Court and decide the case solely on the evidence at the time the juror service began. The juror did not mention anything about being a victim of a crime to other members of the jury.

During a break in the hearing, court clerk Joseph Marshall relayed a conversation he had with the juror's attorney to petitioner's counsel. When the hearing resumed, petitioner's counsel informed the court that juror's counsel told Marshall that as a youth, the juror was involved in an incident which was sexual in nature, reported it, but could recall no details. Petitioner's counsel requested that Marshall testify to this on the grounds that it contradicted the juror's testimony. The trial judge confirmed with Marshall that the contents of his conversation were accurate, then stated that the conversation was now a part of the record. The trial judge declined to extend the investigation or the hearing.

In denying the motion for a new trial, the trial judge found the juror honestly answered all the written and oral questions asked during the impanelment process. The judge also found that the nondisclosure of the juror's past as a victim of a sexual offense was not intentional. In making this decision, the judge recounted an incident during the trial when the juror came forward to relate that a fellow employee had initiated a conversation about the case. The co-worker asked whether the juror knew an individual whose child had attended Fells Acres. Indicating that discussion of the case was not allowed, the juror

ended the conversation. The juror checked the witness list to make sure the person mentioned by the co-worker was not scheduled to testify. The juror reported this incident to the judge in chambers, on the record, with all counsel present. Without objection, the juror was returned. The trial judge was impressed by the juror's honesty and concern for the integrity of the trial process and stated that had the juror harbored any ill-feeling or animosity toward the defendant, it was unlikely the juror would have come forward. In her opinion, the trial judge concluded:

> I decline to adopt a standard that bias or prejudice can be inferred or implied solely in the basis of an event in the experience of a juror or solely on the basis of nondisclosure of same. Based upon the evidence produced and reviewed, it was and is clear and settled in the mind of the court that Juror X harbored no bias or prejudice against the defendant when X cleared the voir dire examination.

After the decision in *Amirault I*, the petitioner filed a renewed motion for a new trial based on juror misconduct. The motion contained new information not revealed at the hearing, specifically, the name of the assailant and the place where the assault occurred and information about the assailant's trial and conviction. The trial judge found that, while the assault was addressed with greater specificity the information did not impact upon her original findings and denied the motion. The Supreme Judicial Court affirmed in *Amirault II*.

III. DISCUSSION

Juror Misconduct

Petitioner has filed his petition under 28 U.S.C. § 2254, the statute governing the review of state court convictions by federal courts. Section 2254(d) contains a presumption of correctness with respect to state court findings of facts. This presumption applies to state trial and appellate courts' factual findings. *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (per curiam), *Sumner v. Mata*, 455 U.S. 591, 597-598 (1982) (per curiam). This presumption may be rebutted in three ways: if any of the grounds listed in 28 U.S.C. § 2254(d)(1)-(7) are found to exist; if the determination is not fairly supported by the record of the state court proceeding; or if the petitioner shows by convincing evidence that the factual determination by the state court was erroneous. 28 U.S.C. § 2254(d)(8).

On federal habeas corpus review, the question of juror impartiality is a question of "historical fact." *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). A trial court's resolution of this question is entitled to special deference on direct appeal and in a habeas proceeding. *Id.* at 1038. *United States v. Angiulo*, 897 F.2d 1169, 1186 (1st Cir. 1990) *cert. denied* 111 S.Ct. 130 (1990). In examining a state prisoner's petition, a federal court may only review the conviction for constitutional error, and in so doing, must apply federal constitutional law. *Ouimette v. Moran*, No. 91-1213, slip op. at 7-8, (1st Cir. August 6, 1991).

Petitioner argues that his Sixth Amendment right to a trial by an impartial and indifferent jury was violated when the juror did not disclose possible bias as a victim of a previous crime on voir dire. The remedy for juror

partiality is a post-trial hearing where the defendant may prove actual bias. *Smith v. Phillips*, 455 U.S. 209, 217 (1982). In *Phillips*, a juror submitted an application for employment to the prosecutor's office during the trial. The Court did not impute bias and held that the proper remedy for allegations of juror partiality is a hearing where the defendant has the opportunity to prove actual bias. Shortly thereafter in *McDonough Power Equip., Inc., v. Greenwood*, 464 U.S. 548 (1984), the Court elaborated on the standard for determining juror partiality.

> [A] party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Id. at 556. Though *McDonough* was a civil case, the standard applies to criminal cases as well. *See United States v. Perkins*, 748 F.2d 1519, 1531-1533 (11th Cir. 1984), *United States v. Aguon*, 851 F.2d 1158, 1170 (9th Cir. 1988) (en banc).

Petitioner contends that the juror's past experience as a victim of sexual abuse was consciously concealed from the Court and the Court's assessment that the juror was able to act as a fair and unbiased juror is not supported by the record. Petitioner states that the juror was able to recall events which occurred prior to the assault, that the juror testified several times during the criminal proceeding against the assailant, and that the juror's reference to "40 years ago" was actually precise – the assault occurred

40 years and 60 days prior to the post-verdict hearing. Petitioner argues these facts, among others, show that the juror did not honestly respond during voir dire or during the post-verdict hearing.

The first prong of the *McDonough* test requires petitioner to demonstrate that the juror did not honestly answer a material question on voir dire. In a criminal trial, past contact with the criminal justice system may be considered material. The question remains whether the juror responded honestly. The trial judge was persuaded of the juror's honesty in responding to questions on voir dire and found that the nondisclosure was unintentional. Petitioner has not presented the court with convincing evidence that the state court's determination was erroneous.[1] Keeping in mind that the trial judge's findings are to be given deference, I accept that the juror "blocked" the memory of the assault and responded honestly during voir dire. None of the other seven factors listed in 28 U.S.C. § 2254(d)(1)-(7) are present. Since the

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[1] The conversation between the juror's attorney and Clerk Marshall is raised by petitioner. Respondent states it is not clear whether the juror's attorney based his information on statements from his client, but cites nothing to support this assertion. The trial judge does not specifically discuss this in her opinion. In weighing this piece of evidence, the Supreme Judicial Court in *Amireault I* stated, "Once the judge accepted the essential truth of the juror's testimony, the need for other witnesses to testify evaporated. Likewise, the judge was warranted in finding that the coversation between the clerk and the juror's attorney did not possess any sufficient impeachment value." *Amireault*, 399 Mass. at 628. I agree with this finding.

first prong of the *McDonough* test is not satisfied, I conclude that the record as a whole supports the determination of the trial judge that there was no actual bias.

Petitioner further argues that these facts require the Court to imply or presume bias. Petitioners argue *Phillips* did not foreclose the use of implied bias in certain situations where a post-conviction hearing will not be adequate to uncover the bias of a juror. *Phillips*, 455 U.S. at 222, 224. (O'Connor, J. concurring). *See McDonough*, 464 U.S. at 556-557 (Blackmun, Stevens, O'Connor, J.J. concurring). Justice O'Connor cited examples of such "extreme" or "exceptional situations:" a juror who is an employee of a prosecuting agency; a juror who is a close relative of one of the participants in the trial or crime; and a juror who was a witness or somehow involved in the crime. *Phillips*, 455 U.S. at 222.

Several Supreme Court cases have considered implied bias; it remains a viable doctrine. Justice O'Connor referred to three cases: *Remmer v. United States*, 347 U.S. 227 (1954); *Dennis v. United States*, 339 U.S. 162 (1950), *reh. den.* 339 U.S. 950 (1950); and *Leonard v. United States*, 378 U.S. 544 (1964) (per curiam) where the Court did not preclude implied bias.[2]

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[2] *Remmer* involved a third party who attempted to bribe a juror. There, where the juror did not engage in misconduct or have a stake in the trial's outcome, there was no "significant incentive" to shield the juror's biases and a postconviction remedy was adequate. In *Dennis*, the fact of a juror's employment by the U.S. Government was not grounds to find implied bias, but the court did not foreclose such a finding under more serious circumstances. In *Leonard*, the Court invoked the doctrine of implied bias and reversed the conviction, holding that

Petitioner urges the court to apply the doctrine of implied bias and cites several circuit court cases where it has been successfully invoked. In these cases, bias has been presumed where a juror or close family member has been involved in a situation similar to that of the crime. Petitioner also discusses *United States ex rel. De Vita v. McCorkle,* 248 F.2d 1 (3rd Cir. 1957) *cert. denied* 355 U.S. 873 (1957) *reh den.* 355 U.S. 908 (1957). *DeVita* involved a juror in a capital case who was the victim of a similar robbery seven months before. Jurors were asked if they had been robbery victims and the juror did not respond. The district court had found no evidence that the juror was not impartial, but the Third Circuit court reversed, finding "colorable" bias. However, this case, unlike petitioner's, involved a juror who was *aware* he had not disclosed the requested information. In addition, the juror was a victim less than a year before the robbery at issue, as opposed to the forty years which had elapsed in the case of the juror in the instant case.

Petitioners [sic] relies on *United States v. Eubanks,* 591 F.2d 513 (9th Cir. 1979) where a juror in a heroin trial did not disclose during questioning on voir dire that his two sons were serving long prison terms for crimes committed to acquire heroin. The Ninth Circuit held that regardless of the father's reason for the his non-disclosure, his son's involvement with heroin bars the inference that he was impartial.

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unseated jurors who had heard a defendant's guilty verdict in the first trial should be automatically prevented from sitting on a second trial on similar charges. *Phillips,* 455 U.S. at 223-224, (O'Connor J., concurring).

Though *Eubanks* appears similar to the instant case, the *Eubanks* juror *intentionally* did not disclose his sons' current incarceration, while the juror's nondisclosure in this case was *not* intentional. The *Eubanks* court stated the juror had a reason for not disclosing, but held that reason was immaterial. The juror in this case had no reason for her nondisclosure, as she had no memory of the assault, so the logic the *Eubanks* court is not applicable. In addition, unlike the *Eubanks* juror whose sons were in prison at the time of the trial, the instant juror's assault occurred over forty years ago.

More recently, the Ninth Circuit declined to find implied bias in *Tinsley v. Borg*, 895 F.2d 520 (9th Cir. 1990), *cert. denied* 111 S.Ct. 974 (1991), a petition for federal habeas relief. In *Borg*, he [sic] petitioner had been convicted of several charges, including rape. A psychiatric social worker who had counseled a rape victim intermittently for a year and a half period three years prior to the trial and had testified at her client's trial did not disclose the rape counseling at voir dire. She remembered it during the trial. At the post-conviction hearing, the juror stated she did not recall the counseling at voir dire and had no recollection of thinking about the prior counseling episode during deliberations. She stated she felt her mind was fair.

Though the Court found this to be a close case, they did not find there were exceptional circumstances as defined by Justice O'Connor to warrant implying bias, despite the fact that the juror *recalled* her experience during the trial. The Court stated the juror's rape counseling client was only one of many during a thirty year career.

While the juror in *Tinsely* [sic] was not the victim of a crime, she was close to the victim's mental state as a result of the crime. Like the juror in this case, she did not recall the incident on voir dire. Though the social worker recalled the counseling during the trial and did not come forth, the court still found there to be no implied bias. By contrast, the instant juror not only had no recollection of the events on voir dire, but did not have any memory of the incident at all. Furthermore, the prompt reporting of the conversation with juror's co-worker indicated the respect and concern the juror had for the trial process. These procedures are set in place to insure a fair trial for the defendant, and the juror's actions indicate a willingness to follow the court's instructions to assure that end. This does not fall within the "exceptional circumstances" of which Justice O'Connor spoke. Reviewing the record in its entirety, I do not find implied bias in these circumstances.

B. Prosecutor's Improper Remarks During Closing Argument

Petitioner contends that three types of remarks were made by the prosecutor in his closing argument, the cumulative effect of which denied him a fair trial. The three remarks were: 1) the prosecutor's improper comments on petitioner's post arrest silence; 2) the prosecutor's suggestion of facts and circumstances not in evidence; and 3) the prosecutor's misstatement of law and fact so as to shift the burden of proof and deceptively characterize the theory of the defense. I examine each of these separately.

1. Post Arrest Silence

Petitioner states that the prosecutor made remarks in his closing on the petitioner's post arrest silence in violation of petitioner's Fifth Amendment right to not incriminate himself. The excerpts from the closing remarks of both the defense attorney ("D") and the prosecutor ("P") are reproduced below:

D: Until this trial, for the past two years, this defendant has barely been a person; he's been some type of disembodied Tooky the child abuser. No one has ever asked him a question. The only words ever said to him in connection with this case prior to this trial are: Your rights; you are under arrest. You have the right to remain silent. That's the only question or only words put to him during the course of the almost two years that this matter has been pending. Well, he's not a disembodied Tooky; he's a real person with a real wife and a real family . . .

P: [Defense Counsel] told you no one ever even asked the defendant a question during the two years that this case was pending, no one bothered to find out what he had to say. The prosecution wasn't interested in his side of the story. But, what [defense counsel] neglected to tell you, ladies and gentlemen, is that the Commonwealth is forbidden by law from approaching a defendant and talking to him after he's been arrested. But, the law, ladies and gentlemen, does not forbid a defendant from approaching the Commonwealth to tell his side of the case, if he wants to; and I say to you, ladies and gentlemen, that you have heard no evidence that the defendant ever tried to do that in this case.

Petitioner immediately moved for a mistrial and made an alternate request for curative instructions immediately after the prosecution's summation. The motion for mistrial was denied and the trial judge allowed petitioner to submit requests for curative instructions. The jury was given specific instructions the next day.

The Fifth Amendment forbids remarks by the prosecution on the defendant's choice to remain silent. The Supreme Court in *Griffin v. California*, 380 U.S. 609 (1965), *reh den.* 381 U.S. 957 (1965) held that a prosecutor, in his closing argument, who commented on the defendant's failure to testify, impermissibly infringed on the defendant's Fifth Amendment right to remain silent. This rule, however, is not absolute. Responses by the prosecution to the defense's comments do not violate the defendant's privilege to be free from compulsory self-incrimination which is guaranteed by the Fifth Amendment. In *United States v. Robinson*, 485 U.S. 25 (1988), a prosecutor's remarks regarding a defendant's right to remain silent was held to be a fair response to defense counsel's statements regarding the inability of his client to "explain" his side of the story. The First Circuit has applied this holding in *United States v. Rouleau*, 894 F.2d 13 (1st Cir. 1990). In *Rouleau*, defense counsel made a comment in his closing regarding the whereabouts of certain monies the government alleged the defendant had received. In his closing, the prosecutor asserted that only the defendant knew the location of the money. Defendant argued this violated his Fifth Amendment right not to testify. The Court, citing *Robinson*, held the government's remarks were "at worst. .a fair response to the defense's argumentative query." *Id.* at 16.

In the instant case, it is clear from the colloquy that the government's comments were in response to the defense counsel's assertions that petitioner had had no opportunity to present his version of the facts. This is constitutionally permissible under *Robinson*; therefore, I find that no Fifth Amendment violation occurred.

2. Facts and Circumstances Not in Evidence

Petitioner also contends that the prosecutor made comments in his closing about the testimony of petitioner's psychiatric expert, Dr. Daniel Schuman and the prosecution's expert, Dr. Jean Emans, which had a prejudicial effect on the jury and denied the petitioner a fair trial. Specifically, the prosecutor stated:

> [Dr. Schuman's] positive loop theory that he talked to you about is not any kind of recognized or accepted theory . . . Dr. [Schuman] is not qualified to deal with children, . . . he does not have any expertise in sexual abuse.

Defense counsel objected. The next day, the trial judge issued a curative instruction to the jury "to disregard that statement as there was no evidence or testimony offered by the Commonwealth that it is not a recognized theory. . . . "

Petitioner argues these statements suggest the prosecutor had personal knowledge that Dr. Schuman's theory was not medically accepted, contrary to the evidence. They further argue the instruction come one day too late and was inadequate to minimize the prejudicial effect it had on the jury.

Regarding the testimony of Dr. Emans, the prosecutor stated:

> You heard Dr. [Emans] describe how child molesters often engage in something called vulva[r] intercourse which does not involve penetration to the vagina and which would not show physical findings in an examination.

Dr. Emans did not testify regarding the habits of child molesters.

In addition, the prosecutor stated in his opening that they would not see any example of regular sexual intercourse, but one child did testify to that effect. The petitioner states Dr. Emans did not offer an opinion that results of a colposcopy were consistent with penetration, therefore, the prosecutor's characterization of Dr. Eman's testimony was an attempt to resolve the discrepancies between his opening statement, the child's testimony and the physical findings. However, respondent points out Dr. Emans testified that children can be sexually abused without actual penetration.

> I define sexually abused children as children who have had inappropriate touching or fondling in the genital area . . . they may have had what we call vulvar coitus, where the penis has actually touched that area, they may have had attempted penetration . . .

Defense counsel objected to the prosecutor's remarks and the judge issued a curative instruction to the jury the next day:

> The Commonwealth made certain references in closing argument relative to testimony by experts on the use of objects by child abusers

> and the practice of vulva[r] intercourse by child abusers. The statements as made would suggest that there was evidence by experts presented as to traits exhibited or conduct engaged in by child abusers. You are instructed to disregard those statements as there was no evidence of the use of objects or vulva[r] intercourse either as a trait or conduct engaged in by child abusers.

"The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Phillips*, 455 U.S. 209, 219 (1982). While the prosecutor went beyond the evidence regarding Dr. Schuman and Dr. Eman's testimony, in both instances, the judge specifically gave curative instructions to the jury. In *Ferreira v. Fair*, 732 F.2d 245 (1st Cir. 1984), *cert. denied* 469 U.S. 1017 (1984), a federal habeas corpus proceeding, the prosecutor made remarks in his closing regarding the credibility of the witnesses and his personal opinion as to the defendant's guilt. The trial judge issued a specific curative instruction to the jury. The Court held that while the remarks were "thoroughly inappropriate", they were not "so egregious as to deprive petitioner of a fair trial" and found no constitutional error. *Id.* at 249. While I do not condone the statements of the prosecution, I find that the judge's specific, timely instructions adequately curtailed the prejudicial effect of these remarks.

3. Misstatements of Law and Burden of Proof

Petitioner contends the prosecutor misstated the law of common scheme and suggested that the defendant had

the burden of disproving the allegation on three occasions in his closing.

> The court will tell you in substance that if you find the defendant was engaged in a common scheme of plan abusing these children, then you can use their testimony to corroborate each other and to rebut the defense position that nothing happened. That instruction is given to you . . . because it is the law . . . But [the defendant] was unable to point to one single thing in the whole world that would account for why all these children and parents have turned against him.

The next day, the court instructed the jury:

> I strongly caution you that you may not consider any evidence of common pattern or course of conduct as evidence showing that the defendant is a person of bad character or that he has a disposition to commit a crime. You are instructed that evidence of common scheme is not to be used to rebut the testimony of the defendant. The defendant is under no duty or obligation to rebut any evidence presented. It can be used, if at all, to corroborate the children's testimony.
>
> I further caution you that you may not consider this evidence so as to dispense with the burden of proof beyond reasonable doubt as to the elements of the crimes charged. . . .

Petitioner also argues that the prosecutor improperly suggested the defense's theory of the case. By misstating the facts, petitioner contends the prosecution deliberately attempted to mislead the jury.

> Look at the big picture, ladies and gentlemen. The defendant is asking you to believe that nine children, ten parents, a grandmother, an uncle, an aunt, a sister, five different police officers, six or seven different social workers, two medical experts, maybe two assistant District Attorneys, are engaged in some [illegible] conspiracy to convict this defendant. . . .

Petitioner's counsel states he requested a curative instruction, which was denied by the trial judge. However the trial judge did deliver the following instruction:

> For a theory of the case proposed by counsel in closing argument to be accepted and adopted by the jury, it must be supported by the credible evidence presented that it's consistent with that theory.

In both instances, the trial judge's instructions to the jury specifically countered the prosecutor's remarks, curtailing their prejudicial effect.

Finally, petitioner finds fault with the prosecutor's reference to the petitioner's home.

> What relevance do you think the visit that you were asked to make to the defendant's home has to do with this case? Do you think that if there were anything in that house of an incriminating nature two years ago, that it was still going to be there when you went to that house last month? Do you think that the visit to the defendant's home was anything more that a blatant attempt to manipulate you emotionally with respect to this defendant?

Petitioner argues that prosecutor inferred that the defendant's home contained incriminating evidence, which

was unsupported by the evidence and therefore prejudicial. It seems more likely, however, that the prosecutor was attempting to suggest to the jury that viewing the home was not for relevance, but to play on their emotions so as to prevent the jurors from fully examining the evidence.

Applying the same reasoning as I did with respect to other aspects of the prosecutor's closing argument, I find that the prosecutor's remarks, viewed individually or cumulatively, did not amount to constitutional error. Petitioner was not deprived of a fair trial.

IV. CONCLUSION

For the reasons set forth above, the petitioner's request for a writ of habeas corpus is DENIED.

SO ORDERED.

/s/ Illegible
United States District Court Judge

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT
Nos. 85-70 to 80
85-2653 to 2666

COMMONWEALTH
VS
GERALD AMIRAULT

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR A NEW TRIAL

Issue: Defendant alleges that one of the deliberating jurors failed to disclose a material fact or intentionally misrepresented a fact during the written and oral voir dire examination of jurors prior to trial. As a result, the defendant argues that he was denied an impartial jury and seeks the remedy of a new trial.

Background

1. The impanelment process began on April 15, 1986 and continued for eight days until a 'pool' of 48 potential jurors was constituted as having been found indifferent. On the eighth day, the seating process began and both sides exercised their pre-emptory challenges. Both sides exhausted their challenges.

2. The court and trial counsel utilized written questionnaires together with oral voir dire examination in the impanelment process.

Three written documents were completed by all jurors who reached the final oral examination.

a. The standard, one-page questionnaire ordinarily filled out by all jurors who are summoned to jury service.

b. A special, three-page questionnaire with details and questions directed to this case was filled out by all jurors called in during the eight-day period. A list of over 375 potential witnesses was appended to this questionnaire.

c. A second, three-page questionnaire was completed by jurors called to the courtroom.

3. The process involved the delivery to the judge and trial counsel each morning of copies of the standard court questionnaire and the specially-drafted questionnaire with the witness list appended. Based upon the responses on these documents, a large number of potential jurors were eliminated each day without further inquiry.

The remaining jurors filled out the second, specially-drafted form. Some were eliminated without further inquiry and the remainder underwent an oral voir dire examination by the court involving, in some instances, both general questions and specific questions about the juror's answers to the written questions.

4. On Friday, April 18, 1986, Juror X reported for jury service and underwent the process above described.

In written response to the standard court form which asks:

> "Describe briefly any involvement (past or present) as a party or victim in a civil or criminal case: you or any member of your family:"

the juror answered: "No".

In written response to the specially-drafted court questionnaire on page two which asks:

"Have you or any member of your immediate family or any of your close friends ever been a victim, witness, or defendant in a criminal case?"

the juror answered: "Yes".

To the follow-up question that stated:

"If 'yes', did the matter come to trial?"

the juror answered: "No".

5. On oral voir dire, Juror X was asked to specify the person referred to in response to the question and the nature of the criminal case. Juror X responded that an immediate family member had been charged with driving under the influence. The juror was then asked about bias based on that event and whether the juror could be fair and impartial in this case. After receiving satisfactory answers, Juror X was found to be indifferent without objection from either side.

6. The trial opened on April 29, 1986. Thereafter, during the progress of the trial, Juror X asked to speak with the court one morning before the daily proceedings began. In chambers and on record in the presence of all counsel, the juror related that a fellow employee had started to engage X in a brief conversation about the case and was stopped from further comments by an admonition from the juror.

In summary, X had stopped at the juror's place of employment to retrieve some personal belongings left at work. A fellow employee began to state that perhaps Juror X might know of an [sic] certain individual who had a daughter attending the Fells school. The conversation went no further due to the intervention of the juror.

X had checked the witness list and had found no individual known to X in the category related by the fellow employee.

During the inquiry in chambers, the witness list was further reviewed with X and no known person surfaced. Nevertheless, X had felt that the incident should be brought to the attention of the court. After completion of inquiry, the juror was returned to the jury without objection from either side.

7. Presentation of evidence closed on June 26, 1986 and the case was sent out to the jury for deliberation on July 8, 1986. The jury remained in deliberation for twelve straight days while sequestered and returned verdicts of 'guilty' on all fifteen indictments on Saturday, July 19, 1986. Sentencing was scheduled for July 31, 1986.

8. On Monday, July 21, 1986, defense counsel received a telephone call that alleged that Juror X had been the victim of a crime or had accused someone of committing a crime against X some years before and that the accused had gone to jail as a result. The caller declined to give specific details by which the allegation could be verified or corroborated. (See impounded affidavits of Kimberly Crespi, secretary, and Atty. Juliane Balliro). After receiving the call, the defense team was able to verify a few pieces of the information that revealed only that the caller knew of or had known Juror X at one time.

9. Defense counsel requested a continuance of the sentencing date from July 31, 1986 to August 21, 1986 to further investigate this matter and to have additional time to prepare for disposition. Continuance was granted.

10. On July 31, 1986, the court met in conference with counsel for both sides to review the preliminary affidavit information. The affidavit material with limited verification was deemed by the court not to be sufficient to meet a threshold requirement of [sic] called Juror X in for further inquiry and hearing. Nevertheless, the court issued an Order waiving G. L. c. 6, s. 172 (CORI) on August 1, 1986 which permitted defense counsel access to examine criminal court records in furtherance of their investigation.

12. By August 11, 1986, defense counsel had received some further points of corroboration (See impounded affidavit of Joseph Guidetti, investigator) and requested a conference hearing on the basis of the additional information received.

A conference with counsel was held and the additional affidavits reviewed. Despite the second-level hearsay nature of the material in the affidavits, the court agreed to call in Juror X for inquiry on the responses to the written juror questionnaires and the allegations in the affidavits. The court further ordered that the motions, affidavits and memoranda on this issue be impounded until further order of court.

13. In response to the summons by the court, Juror X appeared with counsel on August 19, 1986 for an en camera hearing in the presence of all counsel and the defendant.

14. A summary of the inquiry made of Juror X together with personal identifying information is contained in a separate set of findings which are impounded at this time to protect the identity of the juror. These impounded

findings are appended and incorporated by reference in the rulings and decision of the court on this matter.

Standard for Review and Findings on Same

The first purpose of a hearing of this nature is to determine whether a juror failed to answer honestly a material question during voir dire examination. The second purpose is to demonstrate that a correct response would have provided a valid basis for challenge. A further purpose is to determine whether there was actual bias or prejudice on the part of the juror so as to deprive the defendant of an impartial jury and to warrant a new trial in the interest of justice.

A. Whether Juror X failed to answer honestly the questions noted (supra) in these findings?

The court had the opportunity to observe Juror X during the voir dire process and to review and evaluate not only the questions now in issue but all answers, written and oral, at that time. In addition to observing Juror X during the progress of trial, the court was able to make certain observations and assessments of Juror X during the colloquy and inquiry in chambers where Juror X volunteered the information concerning the work incident. Finally, the court was able to observe the responses made to questions asked and the conduct and demeanor of Juror X during the en camera hearing on August 19, 1986.

At the time of the impanelment phase, I found that Juror X was fair and impartial and predisposed to follow

the instructions of the court in deciding this case solely on the evidence produced in court.

The ability of Juror X to follow the instructions of the court was reinforced by the juror's action in coming forward to relate that a fellow employee had initiated a conversation about the case. I was impressed by the honesty and concern of Juror X for the integrity of the trial process as that incident could easily have been disregarded as being of little or no consequence. Had Juror X harbored any ill-feeling or animosity toward the defendant, it would appear unlikely that X would have been troubled or concerned enough to come forward to report same.

In response to the questions posed to Juror X during the hearing of August 19, 1986, I am convinced that X's responses were honest and that X was candid with the court concerning the impartiality of X and open-mindedness at impanelment.

I am further convinced, based upon the evidence produced, that Juror X honestly answered the questions asked during voir dire and that nondisclosure, if any, was not intentional.

There is no evidence to show that an event or experience in the life of X indicated a premature conclusion on the part of X as to the defendant's guilt or a prejudice by X against the defendant or an inability on the part of X to consider the guilt or innocence of the defendant solely based upon the evidence produced at trial.

B. Whether a correct response would have provided a basis for challenge for cause?

The court in this case adopted an extremely liberal stance as far as eliminating jurors for cause. Rather than burdening the record with objections during the impanelment process and aware that the trial was predicted to be lengthy with the availability of a venire pool each day, no effort was made to apply the more restrictive standard for a challenge for cause, i.e., an actual bias standard based upon whether a juror would be able to be fair and impartial. If a question was raised by either side on any basis concerning a potential juror even despite that juror's assurance that he or she could be fair and impartial and had so convinced the court, the juror was inevitably excused.

The defendant is entitled to that basis for challenge for cause which is required by law and not a greater or more liberal standard adopted by the court for its own purpose. Based upon the evidence produced, in this instance, Juror X would have met the legal basis for surviving a challenge for cause.

C. Whether there was actual bias or prejudice on the part of the juror so as to deprive the defendant of a fair trial?

An issue of nondisclosure or lack or full disclosure is not one that is treated lightly by the court. The use of questionnaires and oral voir dire examination is a process by which we seek to eliminate bias and prejudice to the best of our human capabilities and to select a panel of jurors who enter the process with open minds and a disposition to be fair and impartial.

The reasons why information is not disclosed or fully disclosed may vary but it is only those reasons that affect

a juror's impartiality that can be truly said to affect the fairness of the trial.

I decline to adopt a standard that bias or prejudice can be inferred or implied solely on the basis of an event in the experience of a juror or solely on the basis of nondisclosure of same.

Based upon the evidence produced and reviewed, it was and is clear and settled in the mind of the court that Juror X harbored no bias or prejudice against the defendant when X cleared the voir dire examination.

Therefore, based upon the foregoing together with the findings impounded and incorporated in this decision, the defendant's motion for a new trial on this specific issue as raised, be and hereby is DENIED.

By the Court,

/s/ Elizabeth J. Dolan
Elizabeth J. Dolan
Associate Justice
Superior Court

August 20, 1986

Supreme Court, U.S.
FILED
NOV 9 1992
OFFICE OF THE CLERK

(2)

No. 92-605

In the Supreme Court of the United States.

October Term, 1992

GERALD AMIRAULT,
Petitioner,

v.

MICHAEL FAIR, COMMISSIONER,
DEPARTMENT OF CORRECTION,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to determine whether the Court of Appeals properly concluded that a habeas corpus petitioner failed to demonstrate that a juror who had no memory of being a rape victim forty years previously was either actually or impliedly biased.

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GERALD AMIRAULT,
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v.

MICHAEL FAIR, COMMISSIONER,
DEPARTMENT OF CORRECTION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Fair, Commissioner of Correction, respectfully requests this Court deny the petition for writ of certiorari.

OPINIONS BELOW

Petitioner's appeal from the denial of his motion for new trial on grounds

of juror misconduct, expedited apart from the appeal from his convictions, is reported as Commonwealth v. Amirault, 399 Mass. 617, 506 N.E.2d 129 (1987) (Amirault I). His appeal from a renewed motion for new trial and from the convictions is reported as Commonwealth v. Amirault, 404 Mass. 221, 535 N.E.2d 193 (1989) (Amirault II).

The opinion of the United States District Court for the District of Massachusetts denying a petition for habeas corpus on October 7, 1991, is unreported. Appendix 8-29. On July 8, 1992, the United States Court of Appeals for the First Circuit affirmed the denial of the petition. Amirault v. Fair, 968 F.2d 1404 (1st Cir. 1992) (per curiam).

STATEMENT OF THE CASE

Petitioner Gerald Amirault was indicted by a Middlesex County, Massachusetts grand jury on fifteen indictments concerning nine different children, eight charging rape of a child and seven charging indecent assault and battery on a child under fourteen years. The charges involved multiple sexual assaults on male and female children who attended the Fells Acres Day School in Malden, Massachusetts from 1982 until the school closed in 1984. Petitioner, son of the school's owner and director, worked there as a bus driver, helped prepare meals and performed various maintenance tasks at the school. After a twelve week trial, he was convicted in July, 1986 on all indictments.

Jury impanelment lasted for eight days. Each seated juror answered three

written questionnaires, two of which had been specifically tailored for the case, and answered questions individually on voir dire. The potential jurors were asked, among other things, whether any family member or close friend had ever been a victim, witness or defendant in a criminal matter, and if so, whether the matter came to trial. The juror whose impartiality is challenged responded affirmatively to the first question and negatively to the second. On voir dire, she stated that her son had been charged with operating under the influence of alcohol and that the case never came to trial. She also stated that although she knew that the trial concerned child sexual abuse, she knew of no reason why she could not be fair and impartial if she was selected as a juror. Amirault I, 399 Mass. at 620-621, 506 N.E.2d at 132; App. 10-11.

Two days after the verdicts were returned, defense counsel received a telephone call from a man who informed the attorney that he believed that, while a teenager, the subject juror had accused the caller's cousin of rape, that the case had gone to court and his cousin had been sentenced to a prison term. Id. at 619, 506 N.E.2d at 131.

Counsel requested and received permission from the trial judge for access to criminal records in order to investigate the matter. The inquiry revealed that the juror's maiden name had been correctly provided by the caller along with certain other personal matters. On the basis of that corroborating information, counsel extended the scope of the investigation, and a private investigator was retained. Amirault I, 399 Mass. at 620, 506 N.E.2d at 132.

The judge ordered the juror to appear at an in camera hearing. Her order informed the juror that the juror was entitled to have counsel present and that the juror's attorney could view beforehand the documents relating to petitioner's motion for a new trial. Id. at 619-620, 506 N.E.2d at 131-132.

At the hearing, which was conducted in the presence of the petitioner and all counsel in the judge's chambers, the juror testified that she had no memory of being the victim of a crime.[1] She said that she knew that something had happened to her when she was a child but that it had to have been over forty years ago,[2] and she must have

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1/ The judge asked several initial questions of the juror. Subsequently, defense counsel and the prosecutor were given the opportunity to question her.

2/ The juror was fifty-four years old at the time of the hearing.

"blocked" the details from her mind. She also stated that because she had no memory of being the victim of any crime, she had answered the questions on the questionnaire truthfully, to the best of her knowledge. Finally, the juror stated that she decided the case solely on the evidence, and that because she had no memory of being the victim of a crime, she had never mentioned anything about such an experience at any time during the trial or the jury deliberation process.

Following the juror's testimony, the court clerk told counsel that when the juror's attorney called to make arrangements to see the papers on file in this case, he stated that something of a sexual nature had happened to the juror when she was twelve years old. Petitioner's counsel requested that the

court conduct further investigation of the juror and asked to call other witnesses and introduce psychiatric testimony to impeach the credibility of the juror. The trial judge considered what the clerk reported, but declined to extend the investigation or the hearing.

In her decision denying the motion for a new trial, the trial judge found that the juror had honestly answered the pretrial questions and that the nondisclosure of having been a victim of a sexual offense was unintentional. The judge stressed that her conclusion was supported by an incident that had occurred during the trial.[3/]

3/ The juror had reported to the judge, in chambers and on the record in the presence of all counsel, that the juror had stopped at the juror's place of employment to retrieve some personal -

(footnote continued)

The judge noted that had the juror harbored any hostility toward the petitioner, it is not likely that she would have reported the incident. She concluded that the juror was not actually biased toward the petitioner and there was no basis to support a finding of implied bias. Based on her observations of the juror during

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(footnote continued)

belongings. The juror had met a coworker who sought to engage the juror in conversation about the case. Specifically, the fellow worker had asked whether the juror knew a certain person whose daughter attended Fells Acres. The juror had admonished the coworker that the juror was not able to discuss anything connected to the case and the conversation had gone no further. The juror checked the witness list to make sure that the individual mentioned was not scheduled to testify at trial and did not discover that name listed. The list was reviewed again in chambers. The juror was returned to the jury without objection from either side.

impanelment, trial, and at the post-verdict hearing, the judge found the juror to be fair and impartial and predisposed to follow the instructions of the court to decide the case solely on the evidence produced at trial. She found that the juror was candid at the hearing and that if there was any nondisclosure, it was unintentional. These findings were upheld by the Supreme Judicial Court in Amirault I, 399 Mass. at 627, 506 N.E.2d at 136.

Subsequent to the decision in Amirault I, the petitioner filed a renewed motion for new trial based on the results of further investigation of this matter. In his renewed motion, he submitted an affidavit and court records to show that the juror had been raped on June 26, 1946, and that an application for a criminal complaint had been filed several days later. Following a

probable cause hearing, the case was bound over to the grand jury and in the Superior Court, the individual was found guilty.

In her order denying the renewed motion, the judge reviewed the new evidence submitted by the defendant and found that the renewed motion "addressed the prior event in the subject juror's life with greater specificity than the original motion," but, the additional information did not alter her original findings, conclusions and rulings on the issue.

REASONS FOR DENYING THE WRIT

I. CERTIORARI IS NOT APPROPRIATE IN THIS HABEAS CORPUS CASE WHERE THE LOWER COURT CORRECTLY FOUND PETITIONER FAILED TO PROVE A JUROR WAS EITHER ACTUALLY OR IMPLIEDLY BIASED.

A. Petitioner Was Afforded An Adequate Opportunity To Make Out His Claim Of Juror Bias.

In the Court of Appeals, petitioner conceded that "the trial court acted properly in conducting a post-conviction hearing to examine the juror and that trial court findings on questions of juror partiality are presumed correct under 28 U.S.C. § 2254(d) (1988)." Amirault v. Fair, 968 F.2d 1404, 1405 (1st Cir. 1992). His challenge to the presumption of correctness in the Court of Appeals was a claim that the trial judge's findings of impartiality were clearly erroneous as not supported by the record. Id.

In arguing the state court findings were erroneous, petitioner complains that he was "entirely precluded" (Petition at 7) from demonstrating the juror was untruthful and biased because

the judge denied his request to offer testimony of the court clerk and other witnesses. To the extent he now argues the state court findings should be denied the presumption of correctness because of inadequacies in the hearing process, that claim was not made below.

Petitioner was given an adequate opportunity to prove his allegation that the juror was biased as well as the factual underpinnings supporting his claim. Smith v. Phillips, 445 U.S. 209, 217 (1982). The judge granted him access to old criminal records, received and considered affidavits, and conducted an evidentiary hearing at which all parties were present and had a full opportunity to pose questions to the juror. The scope of the hearing was a matter within the discretion of the judge, and was well within the purposes outlined in Smith v. Phillips, 455 U.S.

at 225 (O'Connor, J., concurring). This is especially so given the fact that in presenting the renewed motion, after the Supreme Judicial Court had already rendered its decision in Amirault I, petitioner waived hearing and submitted his claim on affidavits and memoranda. Amirault II, 404 Mass. at 244, 535 N.E.2d at 207.

Once the judge concluded that the juror had honestly answered the voir dire questions and that her nondisclosure of having been a victim was unintentional, there was no reason to extend the hearing further. She did allow petitioner to make an offer of proof of what the clerk would say, but as the Supreme Judicial Court noted, and both federal courts agreed, "[t]he focus of the hearing was not whether the rape had actually occurred, but whether the juror was biased . . . . Once the judge

accepted the essential truth of the juror's testimony, the need for other witnesses evaporated." Amirault I, 399 Mass. at 627-628, 506 N.E.2d at 136. See Appendix 4 n.1; 17 n.1.

B. The Court Of Appeals Applied This Court's Precedents In Concluding Petitioner Did Not Prove The Juror Was Biased.

Contrary to the assertion in the petition (Petition at 5), the Court of Appeals did not find that the juror was not impartial. The lower court properly concluded that petitioner "failed to produce convincing evidence that the trial court's finding that the juror answered honestly the questions on voir dire was erroneous." Appendix 4.

Each court that considered this matter applied the method of evaluating juror partiality claims set forth in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

Both the state and habeas courts found that petitioner failed to prove the juror knowingly concealed anything on voir dire. The trial judge concluded that the juror honestly answered the voir dire questions, crediting the juror's testimony that she had forgotten about the incident. This was solely within the province of the judge, and is a matter given special deference on review in general, and in habeas proceedings in particular. Patton v. Yount, 467 U.S. 1025, 1036-1037 (1984). E.g. Hernandez v. New York, 111 S. Ct. 1859, 1869-1870 (1991); Rushen v. Spain, 464 U.S. 114, 120 (1983), citing Sumner v. Mata, 455 U.S. 591, 598 (1982), and Marshall v. Lonberger, 459 U.S. 422, 431-432 (1983).

The judge's factual findings have a solid basis in the record. They were

not, as petitioner claims (Petition at 7), made solely by accepting the juror's version without question. Rather, they were made after the judge had an opportunity to observe the juror during the voir dire and empanelment, at a mid-trial chambers conference, during the trial itself, and especially during the post-trial hearing where the juror testified. See United States v. Calabrese, 942 F.2d 218, 227 (3d Cir. 1991).

Simply crediting the juror's testimony is not forbidden, Smith v. Phillips, 455 U.S. at 217 n.7, but here the judge cited the bases for her conclusions that the juror was candid, that the misstatements were inadvertent, honest mistakes and ultimately, that the juror was not biased. The judge stressed that her findings were supported by the fact that during the trial the juror had

come forward with information that someone at her place of employment had tried to talk to her about the case. She noted that if this juror harbored any hostility toward petitioner, it was not likely she would have reported the incident which might have caused her to be removed from the jury.

Much of the evidence petitioner presented in support of his post-trial motions was directed toward proving that the juror was in fact the victim of rape as a teenager, and that she pursued the matter by testifying against her attacker in criminal proceedings. The proferred evidence did not show that the juror was dishonest in not mentioning it during the juror selection process. The juror never denied that something may have happened to her. Rather, she stated that she had no memory of being

the victim of a sexual offense, and therefore any failure to disclose was not intentional and her voir dire responses were honest. Petitioner's evidence which suggested that the juror was a rape victim did not impeach her testimony on this point nor render it incredible as matter of law. There are a number of plausible reasons why a person might "block out" memory of an unpleasant experience in his or her youth, particularly a sexual assault. The passage of time alone, forty years in this case, could also account for the absence of memory. See United States v. Colombo, 909 F.2d 711, 713 (2d Cir. 1990) (relative was government lawyer 30 years before); United States v. Casamayor, 837 F.2d 1509, 1575 (11th Cir. 1988) (juror worked with and knew defendant 23 years previously). The

judge's findings were reasonable, based on her assessment and observations of the juror throughout the trial, the juror's demeanor and her testimony.

Even if it could be said that the juror was untruthful in failing to disclose her prior experience, petitioner would not be entitled to a habeas relief because there was no showing that such nondisclosure was motivated by bias toward the petitioner. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. at 556 (only those motives for concealing information "that affect the juror's partiality can truly be said to affect the fairness of a trial"). See United States v. Columbo, 909 F.2d at 713 (credibility bolstered by absence of motive to lie).

Petitioner says that the second part of the McDonough test is also met in

this case because the juror's correct revelation of her past experience would have provided a valid basis for a challenge for cause. Insofar as in this case jurors were routinely excused on voir dire, it is possible that this juror would have been excused by the court. The trial judge indicated she did not apply the legal standard of cause in excusing prospective jurors. However, in a habeas proceeding, the federal courts are obliged to apply federal law, and grant relief only for violations of federal constitutional law. E.g. Ouimette v. Moran, 942 F.2d 1, 4 (1st Cir. 1991). In this circumstance, the "cause" described in the McDonough test must be "cause" as defined by federal constitutional law, not the so-called "law of the case" in petitioner's trial. Under the constitutional standard, excusal for

"cause" is reserved for those jurors who have such fixed opinions that they cannot judge impartially the guilt of the accused. Mu'min v. Virginia, ___ U.S. ___, 111 S. Ct. 1899, 1908 (1991), quoting Patton v. Yount, 467 U.S. at 1035. There is no basis for a finding that this juror could not impartially decide this case.

C. The Court of Appeals Correctly Concluded That This Is Not A Case Where Juror Bias Should Be Implied.

Petitioner claims that this case would provide this Court an opportunity to define the precise circumstances which would warrant a finding of implied juror bias, and argues that the Court of Appeals decision in this case runs contrary to the decisions of other courts in considering implied bias. Certiorari is not appropriate on this

ground because the facts of this case do not rise to the level of such extraordinary circumstances as might require bias to be implied, and the decision of the Court of Appeals is consistent with those of other courts which have considered and applied the doctrine.

The concept of implied juror bias is not new to this Court's jurisprudence. See Smith v. Phillips, 455 U.S. at 215-216; id. at 221-224 (O'Connor, J. concurring); id. at 232-239 (Marshall, Brennan & Stevens, JJ., dissenting); McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. at 556-557 (Blackmun, Stevens & O'Connor, JJ., concurring). A number of state and federal courts have applied the doctrine without difficulty. The delineation of the parameters of the doctrine that petitioner seeks is neither necessary or

appropriate. The doctrine by its nature is not susceptible of bright line rules because the determination of implied bias is uniquely fact-sensitive.

The Court of Appeals correctly concluded that this case does not present such an exceptional situation that the juror should be presumed biased as matter of law. It does not approach the examples cited by Justice O'Connor: "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness somehow involved in the criminal transaction." Smith v. Phillips, 455 U.S. at 222 (O'Connor, J., concurring). In Smith, this Court declined to impute bias to a juror who, during the trial, had sought

employment with the prosecution. Similarly, it declined to impute bias in Rushen v. Spain, 464 U.S. at 120-121, to a juror who had stated on voir dire that she had no personal knowledge of violent crimes, but who revealed mid-trial that a childhood friend had been the victim of a murder when evidence of that very murder was presented at the trial on which she served. In both instances, the Court deferred to the state courts' findings of no bias.

The incident attributed to juror's past in this case occurred forty years earlier and had nothing to do with the case against petitioner. While she was said to have been the victim of rape of a child, she would have been fourteen or fifteen years old at the time; and the nine children victims in this case were small children five years old and younger when they were abused. The rape

of young children, while technically the same offense, is factually very different from the rape of a teenager, and petitioner made no showing that the crime committed against the juror was similar in detail to the crimes of which he was convicted. The allegations in this case did not concern the juror having knowledge or experience with the defendant or any witness. That they suggested she was a victim of a sexual assault should not automatically impute bias to her.

The state and federal courts examined cases from other jurisdictions cited by petitioner which suggest that bias may be implied by a showing that a juror or a close family member has been involved in a situation similar to that on trial. As the District Court noted, each of the situations where bias has

been implied consistently have involved jurors who are aware of a material circumstance about their experience or their relationship to the case and intentionally fail to disclose it. E.g. United States ex rel. DeVita v. McCorkle, 248 F.2d 1, 8-9 (3d Cir.), cert. denied, 355 U.S. 873, reh. denied, 355 U.S. 908 (1957) (in capital case juror's purposeful concealment of his recent victimization of similar crime for which defendant on trial in capital case constituted actual demonstrated bias); Jackson v. United States, 395 F.2d 615, 616, 618 (D.C. Cir. 1968) (presumption of prejudice found in capital case where juror failed to disclose or even admit he was involved in a "love triangle" homicide similar to the case on trial); Government of Virgin Islands v. Bodle, 427 F.2d 532, 533-534 (3d Cir. 1970) (juror's intentional

failure to reveal in rape trial that his sister was victim of rape and homicide warrants reversal under supervisory powers not constitution); United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979) (juror failed to disclose at drug trafficking trial that his two sons were currently serving prison terms for murder-robbery committed to acquire drugs); United States v. Bynum, 634 F.2d 768 (4th Cir. 1980) (juror's knowing failure to disclose, because ashamed, that he had several relatives who had been convicted of crimes warrants new trial); United States v. Perkins, 7748 F.2d 1519 (11th Cir. 1984) (juror lied when said he was not acquainted with defendant or involved in two prior similar cases; bias presumed); United States v. Scott, 854 F.2d 697 (5th Cir. 1988) (juror's knowing failure to

disclose that his brother was deputy sheriff in office that assisted in investigation because he did not think it relevant warrants bias finding); Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991) (in trial of woman whose defense to killing husband was that she suffered from long term battered woman's syndrome, juror knowingly failed to disclose she and her children were victims of long term spousal abuse continuing through time of the trial). But see Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990), cert. denied, 111 S. Ct. 974 (1991) (no implied bias where juror in rape trial did not recall at voir dire that she counseled rape victim, but remembered it during trial and did not disclose). Cf. United States v. Allsup, 566 F.2d 68, 71-72 (9th Cir. 1977) (two jurors who worked for bank that was robbed should have

been excused for cause; employment relationship and reasonable apprehension of violence presumes bias). That the juror was unaware of a prior incident which was not factually similar to the case on trial, and did not intentionally fail to disclose it, makes this case inappropriate for applying an implied bias analysis.

CONCLUSION

For all the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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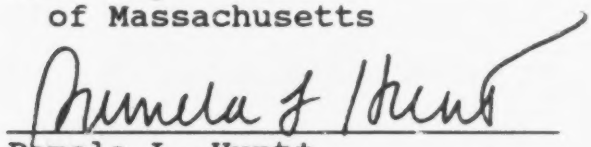

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